

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35981

FINCH PAPER LLC—PETITION FOR DECLARATORY ORDER

Decided: October 6, 2016

On September 27, 2016, Finch Paper LLC (Finch Paper) filed a motion to hold the procedural schedule in abeyance. Delaware and Hudson Railroad d/b/a CP Rail (CP Rail) filed a reply in opposition to the motion. Finch Paper's motion to hold the procedural schedule in abeyance will be granted to the extent discussed below.

By petition filed on December 7, 2015, Finch Paper seeks an order declaring that certain practices and actions by CP Rail relating to CP Rail's assessment of demurrage charges against Finch Paper are unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746.<sup>1</sup> On February 11, 2016, the Board issued a procedural order. That procedural scheduled was modified by decision served on May 13, 2016, at the joint request of the parties.

On July 1, 2016, Finch Paper filed a motion to compel discovery. On July 21, 2016, CP Rail opposed Finch Paper's motion.<sup>2</sup> On August 15, 2016, the Board referred Finch Paper's motion to compel to an administrative law judge (ALJ) at the Federal Energy Regulatory Commission. By decision served on August 23, 2016, the ALJ granted the motion to compel in its entirety. On September 13, 2016, CP Rail appealed the ALJ's ruling to the entire Board. Finch Paper filed a reply in opposition to CP Rail's appeal on September 16, 2016.<sup>3</sup>

On August 24, 2016, Finch Paper filed its Opening Statement in accordance with the Board's May 13, 2016 order modifying the procedural schedule. On September 23, 2016, CP Rail filed its Reply Statement to Finch Paper's Opening Statement, also in accordance with the modified procedural schedule.

Finch Paper, in its motion to hold the procedural schedule in abeyance, argues that, because its Rebuttal to CP Rail's Reply Statement is due on October 13, 2016, the procedural

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<sup>1</sup> This matter was referred by the United States District Court for the Northern District of New York on November 10, 2015, in Delaware & Hudson Railway v. Finch Paper LLC, No. 1:15-cv-00417-TJM-TWD.

<sup>2</sup> Finch Paper and CP Rail also filed surreplies, on August 3 and August 8, 2016, respectively.

<sup>3</sup> On September, 19, 2016, CP Rail filed a response to Finch Paper's reply in opposition.

schedule should be held in abeyance until the Board rules upon CP Rail's appeal. (See Finch Paper Motion 3.) On September 29, 2016, CP Rail filed its opposition to Finch Paper's request to hold the procedural schedule in abeyance. CP Rail argues that Finch Paper could have requested a change in the procedural schedule before the parties' Opening and Reply Statements were submitted. (See CP Rail Reply 3-5.) CP Rail also contends that the Board should not disturb the procedural schedule and address any need for supplemental briefing by the parties if it becomes necessary. (Id. at 6.) Both parties, respectively, reserved the right to supplement their Opening and Reply Statements depending on the outcome of CP Rail's appeal. (See Finch Paper Opening Statement at 13, n.8; see also CP Rail Reply at 6, n.4.)

The Board has not yet ruled on CP Rail's appeal of the ALJ order, and that ruling could affect the substance of Finch Paper's Rebuttal Statement. Therefore, in order for the parties to have the benefit of the Board's ruling on that matter prior to the final evidentiary filing, Finch Paper's motion to hold the procedural schedule in abeyance will be granted, and the procedural schedule will be held in abeyance until the Board rules upon CP's appeal. The Board will address the procedural schedule in a subsequent decision.

It is ordered:

1. The procedural schedule is held in abeyance, as discussed above.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.